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11 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

12 JAMES R. GLIDEWELL DENTAL
13 CERAMICS, INC.,

14 Plaintiff,
15
16 vs.
17 KEATING DENTAL ARTS, INC.,
18 Defendant.
19

20 AND RELATED
21 COUNTERCLAIMS.
22

23 Case No. SACV11-01309-DOC(ANx)

24 JAMES R. GLIDEWELL DENTAL
CERAMICS, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ITS MOTION FOR PARTIAL
SUMMARY JUDGMENT RE
INFRINGEMENT OF A
FEDERALLY REGISTERED MARK
(FIRST CAUSE OF ACTION) AND
DISMISSAL OF DEFENDANT'S
SECOND AFFIRMATIVE DEFENSE
AND FIRST COUNTERCLAIM

25 Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Ctrm: 9D, Hon. David O. Carter

26 Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013
27
28

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(PURSUANT TO PROTECTIVE ORDER DATED JANUARY 30, 2012)

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I. INTRODUCTION

In June 2009, plaintiff James R. Glidewell Dental Ceramics, Inc. (“Glidewell”) began selling a new type of dental crown, made entirely of zirconia, a material with the tensile strength to stand up to highly demanding applications. Glidewell coined the term “BruxZir” as the mark under which to sell this new product, and obtained a registration on the mark on January 19, 2010.

In May 2011, after nearly two years of massive advertising and promotional activity by Glidewell under its BruxZir mark, defendant Keating Dental Arts, Inc. (“Keating”) began selling a competing line of dental crowns and bridges under the brand “KDZ Bruxer,” marketing its product to the same universe of consumers (dentists) through the same marketing channels as are used by Glidewell. Glidewell requested that Keating either stop using the KDZ Bruxer mark in connection with dental crowns and bridges or become an authorized Glidewell-licensed dental laboratory. After Keating refused, Glidewell filed suit, and now moves for partial summary judgment on the issue of infringement of its registered BruxZir mark.

The Court should grant partial summary judgment of infringement because (1) Glidewell’s mark is valid for the reasons set forth in Glidewell’s co-pending Motion for Partial Summary Judgment as to Keating’s Invalidity Defense and Counterclaim (“MPSJ re Keating’s Invalidity Defense”), and (2) the undisputed facts demonstrate that every one of the governing *Sleekcraft* factors favors the conclusion that confusion is likely:

Strength of Glidewell's Mark: The BruxZir mark is both conceptually and commercially strong. First, the mark is suggestive, and is therefore inherently distinctive. There is no such thing as a “BruxZir;” the term was coined by Glidewell to suggest a product strong enough for use by people who suffer from bruxism (“Brux”) and that the product is made of zirconia (“Zir”). Some imagination or “multistage reasoning” is required to understand the significance of the mark; that is all that is required to render the mark suggestive.

1 Second, the mark is commercially strong. Glidewell has invested nearly
 2 REDACTED in promoting products under the mark over the past three years, through a
 3 variety of marketing channels including the Internet, direct mailers, advertisements
 4 in dental journals, trade shows, press releases, continuing education brochures,
 5 videos and training sessions for dentists, samples, and specialized prescription
 6 forms. These efforts have been remarkably effective: nearly REDACTED in
 7 BruxZir-branded crowns and bridges have been sold in the past three years.
 8 Glidewell's BruxZir branded products have received wide recognition and acclaim
 9 in the dental industry as shown by numerous articles written about and awards won
 10 by BruxZir-branded products, and direct evidence shows that dentists are highly
 11 aware of the BruxZir brand. Finally, the industry largely respects Glidewell's
 12 mark; there are only two companies (besides Glidewell and Keating) currently
 13 offering dental restoration products under any marks similar to BruxZir.

14 **Proximity of Goods Marketed under the Marks:** Keating's KDZ Bruxer
 15 crowns and bridges compete directly with Glidewell's BruxZir-brand crowns and
 16 bridges.

17 **Similarity of the Marks:** Keating has merely prefaced a root word
 18 ("Bruxer") that is nearly identical to the entirety of Glidewell's mark ("BruxZir")
 19 with a three-letter acronym ("KDZ") that does not on its face serve any source-
 20 identifying function. The suggestive meaning of the marks is highly similar, with
 21 the root of Keating's mark suggesting use for persons who suffer from bruxism and
 22 the "Z" in KDZ suggesting zirconia. There can be no dispute as to these facts;
 23 Shaun Keating himself has admitted them.

24 **Evidence of Actual Confusion:** Here there is extensive evidence of actual
 25 confusion – in fact, REDACTED

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Marketing Channels: Glidewell's BruxZir-brand dental crowns and bridges and Keating's KDZ Bruxer dental crowns and bridges are marketed through the same channels.

Type of Goods and Degree of Care: The goods at issue here are not such as to require a high degree of care in selecting between brands, and even if they were, the presence of actual confusion among sophisticated consumers enhances (rather than detracts from) the showing that confusion is likely.

Keating's Intent in Selecting the KDZ Bruxer Mark: The undisputed evidence shows that Keating knew of Glidewell's BruxZir mark when it selected its KDZ Bruxer mark to promote its competing goods. This is sufficient as a matter of law to support the conclusion that Keating intended to trade on Glidewell's mark.

Likelihood of Expansion of the Product Lines: The product lines are already directly competitive, so this factor favors Glidewell.

1 While Glidewell need not demonstrate that all eight factors favor it in order
 2 to obtain judgment, here they do. The Court should grant Glidewell's Motion.

3 **II. STATEMENT OF FACTS**

4 Glidewell is a leading provider of dental restoration products to dentists.
 5 (Statement Of Uncontroverted Facts In Support Of James R. Glidewell Dental
 6 Ceramics, Inc.'s Motion For Partial Summary Judgment Re Infringement of a
 7 Federally Registered Mark (First Cause Of Action) and Dismissal Of Defendant's
 8 Second Affirmative Defense and First Counterclaim ("SUF"). Among the products
 9 that Glidewell sells are dental crowns and bridges. (SUF 2). A crown is a type of
 10 dental restoration product that completely caps a tooth. (SUF 3). It is typically
 11 bonded to the tooth using dental cement or resin. (SUF 4).

12 In the past, crowns were principally fashioned either from gold (which has
 13 favorable tensile characteristics but is considered aesthetically unappealing by
 14 many people) or from porcelain veneers fused to a metal casting (which is
 15 aesthetically appealing but tends to crack when subjected to heavy pressure or
 16 grinding). (SUF 5). More recently, dental laboratories began to fashion crowns
 17 made of a veneer fused or adhered to a hard ceramic such as zirconia. (SUF 6).
 18 However, these crowns too tended to crack when subjected to heavy grinding.
 19 (SUF 7).

20 Beginning in 2005, Glidewell began developing a new type of crown, a solid
 21 zirconia crown. (SUF 8). The advantages of this new monolithic zirconia (or "full
 22 contour zirconia") crown were that it would be extremely hard – sufficiently hard to
 23 be used in applications requiring a material with high tensile and compressive
 24 strength, including treating patients with "bruxism," a parafunctional activity in
 25 which a person repeatedly and habitually grinds his teeth – and that it could be
 26 milled from a block of zirconia based on a digital representation of the patient's
 27 mouth. (SUF 9). The disadvantage was that zirconia is an unattractive material,
 28 due to its extreme whiteness and lack of translucency. (SUF 10). Ultimately,

1 Glidewell partially overcame the aesthetic challenges of the material, devising a
 2 process for fabricating a full contour zirconia crown that was sufficiently appealing
 3 that it could be used in a variety of applications. (SUF 11).

4 In early 2009, Glidewell conceived the name for its new line of monolithic
 5 zirconia dental restoration products: BruxZir. (SUF 12). The name was chosen in
 6 large part because it suggested the primary characteristics of the product: that it was
 7 sufficiently strong and durable to be used in a variety of applications, including
 8 treating patients with bruxism (“Brux”), and that the material from which the crown
 9 was fashioned is zirconia (“Zir”). (SUF 13). The product line was launched under
 10 the BruxZir mark in June 2009. (SUF 14). Since its introduction in 2009, the
 11 BruxZir line of restoration products (primarily dental crowns and bridges) has been
 12 phenomenally popular, generating nearly REDACTED in revenue from July 2009
 13 through September 2012. (SUF 16). Glidewell has promoted the product line
 14 heavily, investing nearly REDACTED in advertising its products under the mark from
 15 June 2009 to June 2012. (SUF 17).

16 Glidewell applied to register the BruxZir mark on June 7, 2009 for use in
 17 connection with dental bridges, dental caps, dental crowns, dental inlays, dental
 18 onlays, and dental prostheses. (SUF 18). The mark was registered on the Principal
 19 Register on January 19, 2010, as Reg. No. 3,739,663. (SUF 19). Glidewell applied
 20 to register the mark in connection with dental ceramics on May 27, 2011; Keating
 21 filed an opposition to the application on December 7, 2011, and the case is
 22 currently suspended in the Trademark Trial and Appeal Board pending the outcome
 23 of this action. (SUF 20).

24 In May 2011, Keating began to offer competing full contour zirconia dental
 25 crowns and bridges under the brand “KDZ Bruxer.” (SUF 21). Keating’s product
 26 competes directly with Glidewell’s BruxZir product – the products are offered to
 27 the same universe of consumers (dentists) through the same marketing channels
 28 (e.g., Internet, direct mail, ads in dental industry journals) and at similar price

1 points (\$99 v. \$139). (SUF 53-61). Not surprisingly, in a sampling of 22 dentists
2 identified by Keating as KDZ Bruxer customers, nine – i.e., 41% – were former
3 Glidewell BruxZir customers. (SUF 62).

4 On August 30, 2011, Glidewell filed suit against Keating, alleging claims for
5 infringement of its registered BruxZir mark, unfair competition under section 43(a)
6 of the Lanham Act, and unfair competition under California Business & Professions
7 Code section 17200. (Dkt#1). On October 26, 2012, Keating's Second Amended
8 Answer, Affirmative Defenses and Counterclaims was entered into the docket.
9 (Dkt#67) Keating denies the material allegations of Glidewell's complaint, and
10 alleges (among other things) a Second Affirmative Defense that there is no
11 likelihood of confusion and a First Counterclaim for a declaratory judgment that its
12 KDZ Bruxer mark does not infringe Glidewell's BruxZir mark. (Dkt#67)

13 III. ARGUMENT

14 A. Governing Law

15 The elements of a claim for trademark infringement are: (1) ownership of a
16 valid, protectable mark; and (2) likelihood of confusion arising from defendant's
17 use of the mark. *Brookfield Comms., Inc. v. West Coast Entertainment Corp.*, 174
18 F.3d 1036, 1047, 1053 (9th Cir. 1999). A plaintiff may discharge its burden
19 regarding the first element by proving that it owns a federal registration for the
20 mark. *Id.* at 1047. Proof of registration shifts the burden of proof (not just
21 production) on the issue of validity to the defendant, by a preponderance of the
22 evidence. *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419
23 F.3d 925, 928 (9th Cir. 2005).

24 The Ninth Circuit applies eight factors, known as the *Sleekcraft* factors, in
25 determining whether a likelihood of confusion exists in a case for trademark
26 infringement: (1) strength of the mark; (2) proximity of the goods; (3) similarity of
27 the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type
28 of goods and the degree of care likely to be exercised by the purchaser; (7)

1 defendant's intent in selecting the mark; and (8) likelihood of expansion of the
2 product lines. *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1209 (9th
3 Cir. 2012); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979).
4 These factors are applied in a flexible fashion, not as a rote checklist; in other
5 words, “we do not count beans.” *Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142
6 F.3d 1127, 1129 (9th Cir. 1998). However, evidence of actual confusion, at least on
7 the part of an appreciable portion of the actual consuming public, constitutes strong
8 support for a finding of “likelihood of confusion.” *See, e.g., Playboy Enterprises,
9 Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1026 (9th Cir. 2004).

10 **B. Keating’s Infringement of Glidewell’s Registered BruxZir Mark**

11 **1. Glidewell Owns the BruxZir Trademark Registration for Use on**
12 **Dental Crowns and Bridges**

13 It is undisputed that Glidewell owns the trademark registration for BruxZir
14 on the class of goods including dental crowns and bridges. (SUF 20). It is also
15 undisputed that Glidewell is the senior user, as it has been marketing its goods
16 under the BruxZir mark since June 2009, whereas Keating commenced marketing
17 its competing goods under its KDZ Bruxer mark in May 2011. (SUF 21).

18 **2. Glidewell’s BruxZir Mark is Valid**

19 Glidewell’s registration for the BruxZir mark shifts the burden of proof
20 regarding validity to Keating. *Yellow Cab*, 419 F.3d at 928. Glidewell addresses
21 this element of its claim in its co-pending MPSJ re Keating’s Invalidity Defense,
22 which is incorporated herein by reference.

23 **3. Likelihood of Confusion**

24 **a. Strength of the BruxZir Mark**

25 The strength of a mark for the purpose of evaluating likelihood of confusion
26 is evaluated in terms of its conceptual strength and its commercial strength.
27 *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1207 (9th Cir. 2000). A strong
28 trademark is entitled to a greater degree of protection than a weak mark. *Id.*

(i) The BruxZir Mark is Conceptually Strong

The strength of a mark depends, at least in part, on where it falls on the spectrum of conceptual strength, the guideposts of which are fanciful (the strongest), arbitrary, suggestive, descriptive and generic (the weakest). *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992).

For the reasons set forth in Glidewell’s co-pending MPSJ re Keating’s Invalidity Defense, Glidewell’s BruxZir mark is suggestive. If a consumer “must use imagination or any type of multistage reasoning to understand the mark’s significance,” then the mark does not describe the product’s features but rather suggests them. *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 n. 8 (9th Cir.1998). The BruxZir mark is suggestive because it suggests (but does not directly describe) a particular quality or characteristic of the dental restoration products that Glidewell offers under the mark: it suggests that crowns marketed under the brand are strong because they are appropriate for patients who “brux,” i.e., who grind their teeth, and also suggests that the crowns are made from zirconia, a particularly hard material. (SUF 13). Of course, Glidewell’s crowns are not used only by people who suffer from bruxism; they are used by a variety of patients who choose to have monolithic zirconia crowns due to tooth damage caused by a variety of conditions. (SUF 9). Accordingly, Glidewell’s BruxZir mark is suggestive. (SUF 13). It is therefore inherently distinctive; this factor weighs in favor of finding that confusion is likely. *Conversive, Inc. v. Conversagent, Inc.*, 433 F. Supp. 2d 1079, 1090 (C.D. Cal. 2006) (granting summary judgment in favor of registered mark).

(ii) The BruxZir Mark is Commercially Strong

A mark is commercially strong when it is widely recognized by relevant consumers in a particular market. *Lahoti v. VeriCheck, Inc.*, 636 F.3d 501, 508 (9th Cir. 2011). Thus, a registrant’s efforts to promote the mark in association with its goods or services can augment the strength of its mark as a source identifier. *Id.*;

1 *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1179 (9th Cir. 1988)
2 (“Marks may be strengthened by extensive advertising, length of time in business,
3 public recognition, and uniqueness.”). It is undisputed that the relevant consumers
4 for Glidewell’s BruxZir-brand crowns and bridges are dentists. (SUF 25). Thus,
5 Glidewell’s efforts to promote – and success in promoting – the BruxZir mark to
6 dentists is highly relevant to the strength of the mark. *Lahoti*, 636 F.3d at 508
7 (affirming the district court’s finding that the mark at issue was commercially
8 strong due to the extensive advertising of the mark at issue); *Fortune Dynamic, Inc.*
9 *v. Victoria’s Secret Stores Brand Mgmt.*, 618 F.3d 1025, 1034-35 (9th Cir. 2010);
10 *Century 21*, 846 F.2d 1175, 1179 (9th Cir. 1988) (holding that plaintiff Century 21
11 Real Estate Corp.’s mark was strong because plaintiff expended several million
12 dollars in advertising real estate services in connection with its mark and the mark
13 has been used in connection with numerous real estate sales).

14 Glidewell promotes its dental crowns and bridges under the BruxZir mark
15 through a broad range of channels, including the Internet (through Glidewell’s blog
16 as well as www.BrxZir.com), direct mailers, trade shows, ads in dental industry
17 publications, press releases, continuing education brochures, videos and training
18 sessions for dentists, samples, and specialized prescription forms. (SUF 25-40).
19 Over the period June 2009 to June 2012, Glidewell spent approximately REDACTED
20 in promoting its products under the BruxZir mark through these channels. (SUF
21 27). About REDACTED of this was spent marketing Glidewell’s BruxZir finished
22 crowns and bridges, and about REDACTED was spent marketing Glidewell’s BruxZir
23 zirconia milling blanks. (SUF 28). About REDACTED was spent on direct mail
24 advertising, which was sent to roughly every dentist in the country, and another
25 roughly REDACTE was spent on advertising in dental industry publications, with the
26 remainder being allocated among Glidewell’s other marketing channels. (SUF 29).

27 Glidewell’s advertising of products under the BruxZir mark has
28 accomplished substantial market penetration. (SUF 30). For example, between

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1 October 2009 and November 2012, the www.BruxZir.com website received
2 approximately 289,210 unique pageviews, of which 78% constituted U.S. traffic.
3 (SUF 31). As a point of reference, there are only approximately 125,000 dentists in
4 the United States. (SUF 32). Glidewell's direct mail advertising of products under
5 the BruxZir mark is sent every quarter to nearly the entire population of dentists in
6 the country. (SUF 33). Glidewell's promotion of the BruxZir product line in dental
7 industry publications is consistent, ongoing and pervasive – the advertisements run
8 in numerous publications, including ADA News (once a month), Chairside
9 Magazine, Dental Economics, Dental Lab Reports, Dentaltown, Dental Tribune,
10 Dentistry Today, Inclusive Magazine, JDT, and LMT. (SUF 35). Glidewell selects
11 these publications because of their wide readership and ability to reach thousands, if
12 not hundreds of thousands, of dentists and dental laboratories. (SUF 35).

13 In addition, Glidewell attends dozens of trade shows and conventions a year
14 around the country, especially the American Dental Association conventions. (SUF
15 37). At these conventions and trade shows, Glidewell consistently, prominently
16 displays the BruxZir product line in a variety of contexts, including on the booth,
17 the signage, in brochures, and takeaways. (SUF 38). In addition, Dr. Michael
18 DiTolla, Glidewell's Director of Clinical Education and Research, and Robin
19 Carden, Glidewell's Vice President of Research and Development, make
20 educational videos, write articles and give presentations concerning Glidewell's
21 BruxZir-branded products. (SUF 39). Dr. DiTolla's presentations and videos are
22 viewed by thousands of dentists every year. (SUF 40).

23 Glidewell's BruxZir branded products have received wide recognition and
24 acclaim in the dental industry. (SUF 41). Numerous articles have been written by
25 third parties concerning the BruxZir products and referencing them by Glidewell's
26 registered mark; a partial collection of 13 of these articles is submitted in support of
27 this Motion. (SUF 42). In addition, Glidewell has received numerous awards
28 recognizing the superiority of its BruxZir-brand dental crowns and bridges,

1 including (1) the 2010 Best Product Innovation Award from Tosch Corporation, (2)
2 the Journal of Dental Technology's Wow! 2011 Products Awards, (3) Inside Dental
3 Technology 2011 iNavigator Top Pick, (4) 2011 Best Product from Clinician's
4 Report, (4) the Pride Institute's 2012 Best of Class Technology Award, and (5)
5 2012 semifinal candidate for Best New Material. (SUF 43).

6 The commercial strength of the mark is also demonstrated by the volume of
7 goods sold under the mark. BruxZir is the number one prescribed brand of full
8 zirconia dental crown in the country. (SUF 44). From June 2009 to September
9 2012, Glidewell has sold approximately REDACTED dental crowns and bridges
10 under the mark. (SUF 45). In monetary terms, from July 2009 to September 2012
11 Glidewell sold nearly REDACTED worth of dental crowns and bridges under the
12 BruxZir mark. (SUF 46).

13 In addition, the very strong brand recognition that Glidewell has achieved
14 through its extensive advertising of its dental crowns and bridges under the BruxZir
15 mark is evidenced by third party recognition of the strength of the brand. First, the
16 evidence shows that a large portion of dentists in the U.S. recognize the BruxZir
17 brand for dental crowns and bridges. Dr. DiTolla travels extensively throughout the
18 country and has spoken with thousands of dentists over the past three years, and
19 based on his many interactions with fellow dentists opines that the BruxZir brand
20 has achieved wide recognition among dentists. (SUF 47). Moreover, third party
21 research supports this conclusion: in 2010, Dentsply, the second largest dental
22 company in the United States and a manufacturer of ceramic products, conducted
23 research to identify brands for fixed products (such as crowns and bridges) that
24 have a high degree of recognition among dentists and dental laboratories in the U.S.
25 (SUF 48). The results indicated that Glidewell's BruxZir mark had a high degree of
26 recognition. (SUF 49).

27 The commercial strength of the mark is further demonstrated by the fact that
28 it is relatively unique in its field. A mark that has relatively unique linguistic

1 recognition in a given field is a strong mark. *Century 21*, 846 F.2d at 1179. Here,
2 there are only five marks used in commerce that sound anything like BruxZir for
3 use in connection with either dental crowns or with constitutive materials: (1)
4 Glidewell's registered BruxZir mark; (2) Glidewell's unregistered BruxZir mark;
5 (3) Keating's KDZ Bruxer mark; (4) "GPS BruxArt" (a competitor's junior pending
6 mark); and (5) "BruxThetix" (another competitor's junior pending mark). (SUF
7 50). This is not a crowded field in which several companies are using a mark
8 similar to BruxZir to sell similar products or services; the BruxZir mark is
9 relatively unique in its field. (SUF 51). The fact that many companies have
10 abandoned confusingly similar marks when confronted with the BruxZir mark,
11 further indicates the industry's recognition of the strength of the mark.

12 In factual settings similar to that here, the Ninth Circuit has not hesitated to
13 affirm entry of summary judgment in favor of the registered mark. For example, in
14 *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175 (9th Cir. 1988), the district
15 court granted summary judgment in favor of the registered "Century 21" mark, and
16 the Ninth Circuit affirmed. In evaluating the strength of the mark, the court held
17 that a mark "may be strengthened by extensive advertising, length of time in
18 business, public recognition, and uniqueness," and found that evidence that Century
19 21 had "expended several million dollars" in advertising real estate services under
20 the mark and that the mark had been used in connection with real estate sales in
21 excess of one billion dollars supported the district court's determination that the
22 mark was strong. *Id.* at 1179. Accordingly, the mark is commercially strong.
23 (SUF 52).

24 **b. Proximity of Glidewell's and Keating's Goods Marketed**
25 under the Pertinent Marks

26 "Directly competing goods are in the closest proximity under the likelihood
27 of confusion analysis." *Conversive*, 433 F.Supp.2d at 1091. If goods directly
28 compete, "confusion will usually arise . . ." *Id.*

1 This factor strongly demonstrates that buyers are likely to be confused,
2 because Keating's dental crowns and bridges compete directly with Glidewell's
3 dental crowns and bridges. Both Glidewell and Keating sell dental crowns and
4 bridges throughout the United States. (SUF 54). Both Glidewell and Keating sell
5 full contour zirconia crowns and bridges under the competing marks. (SUF 53).
6 Both Keating and Glidewell sell these crowns and bridges to the same universe of
7 potential buyers – dentists throughout the U.S. (SUF 57). Glidewell's crowns are
8 sold at a comparable price point to Glidewell's crowns – Glidewell's BruxZir
9 crowns are sold for \$99, and Keating's KDA Bruxer crowns are sold for \$139.
10 (SUF 59-60). REDACTED

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13 In fact, dentists consider Glidewell's BruxZir
14 crowns and Keating's KDZ Bruxer crowns to be directly competitive. (SUF 61).
15 This is further borne out by the fact of the 22 dentists that Keating identified as
16 KDZ Bruxer customers in its Third Amended Disclosures, nine – i.e., 41% – were
17 former BruxZir customers of Glidewell. (SUF 62). Accordingly, the evidence
18 leave no room for genuine dispute but that Glidewell's BruxZir crowns and bridges
19 and Keating's KDZ Bruxer crowns and bridges directly compete. This factor
20 favors the conclusion that confusion is highly likely. *Century 21*, 846 F.2d at 1179
21 (the fact that the goods marketed under the marks were “essentially the same”
22 supported summary judgment in favor of the registered mark); *Conversive*, 433
23 F.Supp.2d at 1091(finding that the fact that the “type of goods and services at
24 issue” were the same supported summary judgment in favor of the registered mark).

25 **c. Similarity of the Marks**

26 To evaluate the similarity of the marks, courts look to the “sight, sound and
27 meaning” of the marks, and recognize that “any similarities weigh more heavily
28 than differences.” *Rearden*, 683 F.3d at 1211. When evaluating the similarities

1 between marks, a lesser degree of similarity is required when the goods are directly
2 competitive. *Sleekcraft*, 599 F.2d at 350; *Official Airline Guides, Inc. v. Goss*, 6
3 F.3d 1385, 1392 (9th Cir.1993) (“Related goods are more likely than non-related
4 goods to confuse the public as to the producer of the goods. A diminished standard
5 of similarity is therefore applied when comparing the marks of closely related
6 goods.”). Ultimately, “the greater the similarity between the two marks at issue, the
7 greater the likelihood of confusion.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d
8 1199, 1206 (9th Cir.2000). In addition, “the marks should be considered as they
9 appear in the marketplace.” *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135,
10 1144 (9th Cir.2002).

11 As shown above, Glidewell has expended substantial amounts promoting its
12 dental crowns and bridges under the BruxZir mark, rendering this mark
13 commercially strong and lessening the degree of similarity required to support a
14 finding of likely confusion. When a mark is strong, “the fact that a consumer
15 would likely notice the difference between two marks might not suffice for a
16 finding that the marks are dissimilar.” *Entrepreneur*, 279 F.3d at 1145 n.9. That is
17 exactly the case here – while there are differences between the two marks, the
18 strength of Glidewell’s mark nevertheless renders confusion much more likely.

19 In any event, even were the law’s thumb not planted firmly on Glidewell’s
20 side of the scale, the “sight” factor weighs strongly in favor of confusion.
21 Glidewell’s BruxZir mark is a standard suggestive word mark. It is not a composite
22 mark, as it does not include two or more separable word elements or a design or
23 logo. TMEP §§1213.05 et seq. (SUF 63). Keating’s KDZ Bruxer mark is a
24 composite mark, consisting of the separable components “KDZ” and “Bruxer.”
25 (SUF 66). While the Court is to consider both marks in their entirety, the anti-
26 dissection rule does not preclude a fine analysis of the similarities and differences
27 between the marks. Here, Keating has merely prefaced a root word (“Bruxer”) that
28 is nearly identical to the entirety of Glidewell’s mark (“BruxZir”) with a three-letter

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1 acronym (“KDZ”) that does not on its face serve any source-identifying function.
2 (SUF 65). Keating capitalizes the first letter of the “Bruxer” component of its
3 mark, just as Glidewell capitalizes the first letter of “BruxZir.” (SUF 64). While
4 Keating has apparently attempted to highlight the “KDZ” portion of its mark in
5 some of its advertising, the fact that KDZ is an opaque acronym means that it
6 cannot merely rely on the prefix to differentiate; in any event, in the text of its
7 advertisements the term is no more prominent than the “Bruxer” root of its mark.
8 (SUF 66). Thus, the two marks are substantially similar. Indeed, if Keating’s
9 addition of “KDZ” to the root “Bruxer” is likely to accomplish anything in this
10 context, it is to suggest to dentists some association or affiliation between Keating
11 and Glidewell. *UMG Recordings, Inc. v. Mattel, Inc.*, 100 U.S.P.Q.2d 1868, 2011
12 WL 5014005 (T.T.A.B. 2011) (Applicant’s MOTOWN METAL for toy cars in
13 Mattel’s HOT WHEELS line was sufficiently similar to opposer’s MOTOWN
14 music and recordings that confusion was likely).

15 The likelihood that the similarities of the marks will confuse is heightened by
16 the fact that buyers in the relevant market (i.e., dentists) are not likely to consider
17 the marks side by side as a shopper would two competing brands in a supermarket;
18 instead, they are likely to consider the marks separately at different points in time.
19 (SUF 67). This fact tends to support the determination that confusion is likely,
20 (SUF 68), because subtle differences in the marks are less likely to be “in the
21 buyer’s mind” when the buyer makes the decision to purchase Keating’s dental
22 crowns under the KDZ Bruxer mark. *Fleischmann Distilling Corp. v. Maier*
23 *Brewing Co.*, 314 F.2d 149, 161 (9th Cir. 1963) (“In determining whether there is a
24 likelihood of confusion we must remember that the members of the purchasing
25 public have only general impressions which must guide them in the selection of
26 products.”); *Sicilia Di R. Biebow & Co. v. Cox*, 732 F.2d 417, 433 (5th Cir. 1984)
27 (“The inability [of consumers] to compare the products side by side and observe the
28 precise differences in appearance may increase the likelihood of confusion. When

1 making a decision to purchase the consumer must rely on memory rather than a
2 visual comparison.”).

3 In addition, the meaning associated with a mark may also indicate a
4 likelihood of confusion. “Confusing similarity may exist if the two terms convey
5 the same idea or meaning.” *Clamp Mfg. Co., Inc. v. Enco Mfg. Co., Inc.*, 870 F.2d
6 512, 518 (9th Cir. 1989). Here, the BruxZir mark and the KDZ Bruxer mark
7 suggest similar meanings. BruxZir suggests a product indicated for people who
8 suffer from bruxism, i.e., people who tend to grind their teeth (“Brux”) and that the
9 product is made of zirconia (“Zir”). (SUF 70). Similarly, KDZ Bruxer suggests a
10 product indicated for people who suffer from bruxism (“Bruxer”) and that the
11 product is made of zirconia (the “Z” in KDZ). (SUF 71). This is not open to
12 dispute: Sean Keating admitted at deposition that he chose the “Bruxer” mark
13 because dentists had been asking for a product for their bruxism patients – “KDZ
14 Bruxer is just – for your grinder patients” – and that the “Z” in KDZ “implies
15 zirconia.” (SUF 69).

16 Cases are legion in which identity or substantial similarity in marks that share
17 only a suffix has been found sufficient to demonstrate a likelihood of confusion,
18 particularly where the goods branded under the marks are competitive. For
19 example, in *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521 (9th
20 Cir. 1984), the district court preliminarily enjoined the defendant from selling its
21 computer kit under the mark “Pineapple,” and the Ninth Circuit affirmed. The
22 court held that the district court had not abused its discretion in finding that “the
23 addition of the prefix “Pine” to the trademark “Apple” presented a likelihood of
24 confusion,” particularly since the mark might “suggest that the computer kits are
25 manufactured by licensees or subsidiaries of Apple.” *Id.* at 526. Notably, in the
26 *Apple* case the junior user’s computer kits did not directly compete with Apple’s
27 computers, whereas here Keating’s dental crowns and bridges sold under its KDZ
28 Bruxer mark directly compete with those of Glidewell. *See also Conversive*, 433

1 F.Supp.2d at 1091 (finding CONVERSAGENT to be “phonetically and visually
2 very similar” to CONVERSIVE AGENT).

3 **d. Evidence of Actual Confusion**

4 There is significant evidence of actual confusion, from the files of both
5 Glidewell and Keating – in fact, evidence of REDACTED

6 “Evidence of actual confusion constitutes persuasive proof that future
7 confusion is likely.” *Thane Intern., Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 902
8 (9th Cir.2002). “[T]he Second Circuit, in applying a factor similar to the Sleekcraft
9 ‘degree of care’ factor, held that the likelihood of confusion is actually increased
10 where there is evidence that sophisticated consumers are actually confused.”

11 *Conversive, Inc. v. Conversagent, Inc.*, 433 F. Supp. 2d 1079, 1092-93 (C.D. Cal.
12 2006) (*citing Morningside Group Ltd. v. Morningside Capital Group, L.L.C.*, 182
13 F.3d 133 (2d Cir. 1999)). “The potential buyers of the parties’ products are
14 sophisticated business people rather than run-of-the-mill consumers; nevertheless,
15 at least two of those potential buyers have found the parties’ marks to be
16 confusing.” *Conversive, Inc.*, 433 F. Supp. 2d at 1092-93. Moreover, “the parties’
17 marks and the products are so similar that ‘initial interest confusion’ —where a
18 ‘defendant uses [a] plaintiff’s trademark in a manner calculated to capture initial
19 consumer attention’—is very likely.” *Conversive, Inc.*, 433 F. Supp. 2d at 1093.

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1 relevant market was sufficient to support summary judgment for the plaintiff.
2 *Century 21*, 846 F.2d at 1179. Here, there is a mountain of evidence of actual,
3 direct confusion. The Court should grant summary judgment for Glidewell.

4 **e. Marketing Channels**

5 “Convergent marketing channels increase the likelihood of confusion.”
6 *Sleekcraft*, 599 F.2d at 353. Here, the channels through which Glidewell’s
7 BruxZir-brand dental crowns and bridges are marketed are nearly identical to those
8 through which Keating’s KDZ Bruxer-brand dental crowns and bridges are
9 marketed. (SUF 88). As noted above, Glidewell promotes its dental crowns and
10 bridges under the BruxZir mark through the Internet (through Glidewell’s blog as
11 well as www.BrxZir.com), direct mailers, trade shows, ads in dental industry
12 publications, press releases, continuing education brochures, videos and training
13 sessions for dentists, samples, and specialized prescription forms. (SUF 26).

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17 . In fact, not only do Glidewell and Keating promote
18 their competing products under their similar brands in the same marketing channels,
19 they do so in the same magazines – such as ADA News, Dental Economics,
20 Dentistry Today, and Dentaltown. (SUF 90). REDACTED

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27 This strongly supports a finding that confusion is likely.

28 *Century 21*, 846 F.2d at 1179 (the fact that the marketing channels were

1 “substantially the same” supported summary judgment in favor of the registered
2 mark); *PerfumeBay.com Inc. v. eBay Inc.*, 506 F.3d 1165, 1174-75 (9th Cir.2007)
3 (courts consider the use of the Internet as a marketing and advertising channel “as
4 exacerbating the likelihood of confusion.”).

5 **f. Type of Goods and Degree of Care**

6 Even sophisticated consumers, such as dentists, are not immune from
7 mistaking one mark for another. *Schering Corp. v. Alza Corp.*, 207 U.S.P.Q. 504
8 (T.T.A.B. 1980) (finding that while physicians and pharmacists are knowledgeable
9 in their fields, they are not necessarily knowledgeable as to marks, thus not immune
10 from mistaking one mark for another); *Alfacell Corp. v. Anticancer Inc.*, 71
11 U.S.P.Q.2d 1301 (T.T.A.B. 2004) (“[T]here is no reason to believe that medical
12 expertise as to pharmaceuticals will ensure that there will be no likelihood of
13 confusion as to source or affiliation.”); *Blansett Pharmacal Co. v. Carmrick
14 Laboratories, Inc.*, 25 U.S.P.Q.2d 1473 (T.T.A.B. 1992) (found likely confusion
15 between prescription drugs NALEX and NOLEX for nasal decongestants because
16 of similar goods marketed under marks which “look alike and sound alike.”); *KOS
17 Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 716 n.13 (3d Cir. 2004)
18 (“medical expertise is not enough, in and of itself, to lessen the likelihood of
19 confusion in prescription drug cases.”).

20 A dentist’s selection of one full contour zirconia crown over another is not a
21 decision that inherently requires a high degree of care. While there are aesthetic
22 differences between different brands of full contour zirconia crown, the properties
23 of these crowns are highly similar because all of these crowns are made of the same
24 material – zirconia. (SUF 91). The price differential between Glidewell’s BruxZir-
25 brand crowns and Keating’s KDZ Bruxer crowns (\$99 v. \$139) is not so great as to
26 reward focused attention on the brand under which the crowns are marketed,
27 particularly since in most instances a patient’s insurance will cover the cost. So,
28 this factor too suggests that confusion is likely.

1 Moreover, even if there were evidence that a high degree of care were used
2 by dentists in selecting a particular brand of monolithic zirconia crown, that would
3 not be the end of the matter. Where there is evidence that sophisticated consumers
4 are actually confused (as there is here), the likelihood of confusion based on the
5 degree of care factor is *enhanced*. *Conversive*, 433 F.Supp.2d at 1093. Moreover,
6 even where a high degree of care is exercised, initial interest confusion may still
7 exist. *Id.* That is exactly the situation here. In any event, even if this factor
8 supported Keating (which it does not), it would not be sufficient to overcome
9 Glidewell's strong showing that confusion is likely. *Pacific Telesis Group v.*
10 *International Telesis Communications*, 994 F.2d 1364, 1369 (9th Cir. 1993).

11 g. Keating's Intent in Selecting the Mark

12 Although proof of intent to deceive consumers is not necessary to establish
13 trademark infringement, intent is relevant because, “[w]here an alleged infringer
14 chooses a mark he knows to be similar to another, one can infer an intent to
15 confuse.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1293 (9th
16 Cir.1992) (*citing Sleekcraft*, 599 F.2d at 354).

17 The evidence indicates that Keating was aware of Glidewell's BruxZir mark
18 when it made the decision to begin selling competing products under the KDZ
19 Bruxer mark. REDACTED

20 By that time, Glidewell's BruxZir mark was
21 already well known in the industry; indeed, Glidewell had already spent about
22 REDACTED promoting its goods under the BruxZir mark. (SUF 95).
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Given that the BruxZir mark was registered on the Principal Register in January 2010, the trademark search report undoubtedly contained a reference to Glidewell's BruxZir mark; no other inference is reasonable. Moreover, given the extensive advertising that Glidewell had already conducted under its BruxZir mark, including in numerous dental journals, from 2009 through early 2011, there can be no genuine dispute but that Keating was either already aware of Glidewell's BruxZir mark, or became aware of it through the brand selection process, prior to selecting its KDZ Bruxer brand.

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18 *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290 (Fed. Cir. 2011)
19 (“Because direct evidence of deceptive intent is rare, a district court may infer
20 intent from indirect and circumstantial evidence.”). Here, substantial evidence of
21 Keating’s intent to free-ride on Glidewell’s good will in the BruxZir mark exists,
22 and Keating can point to nothing to tip the scales back in its favor. The Court
23 should find that this factor favors Glidewell.

24

h. Likelihood of Expansion of the Product Lines

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This factor favors a finding of likely confusion because the product lines are already identical. *Conversive*, 433 F.Supp.2d at 1093.

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1 **IV. CONCLUSION**

2 For the reasons set forth above, this Court should grant partial summary
3 judgment in favor of Glidewell.

4 Dated: November 19, 2012

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1 ***Glidewell Laboratories v. Keating Dental Arts, Inc.***
2 United States District Court, Central, Case No. SACV11-01309-DOC (ANx)

3 **CERTIFICATE OF SERVICE**

4 I hereby certify that on November 19, 2012, I electronically filed the
5 document described as **MEMORANDUM OF POINTS AND AUTHORITIES**
6 **IN SUPPORT OF FOR PARTIAL SUMMARY JUDGMENT RE**
7 **INFRINGEMENT OF A FEDERALLY REGISTERED MARK (FIRST**
8 **CAUSE OF ACTION) AND DISMISSAL OF DEFENDANT'S SECOND**
9 **AFFIRMATIVE DEFENSE AND FIRST COUNTERCLAIM** with the Clerk of
10 the Court using the CM/ECF System which will send notification of such filing to
11 the following:

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